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MUHAMMAD ADAM YUSOFF ABDUL HAFIZ & ANOR v. SEKOLAH MENENGAH PENDIDIKAN KHAS VOKASIONAL SEKSYEN 17 SHAH ALAM & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD NAZLAN GHAZALI JCA
B AZMI ARIFFIN JCA
FAIZAH JAMALUDIN JCA
[CIVIL APPEAL NO: W-01(NCvC)(W)-74-02-2023]
25 JULY 2025

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Abstract – *When the person with firsthand knowledge fails to give evidence, any record or statement that they made outside of court often remains inadmissible or, at the very least, carries significantly reduced weight. Live testimony under oath, subject to cross-examination, are preferred to establish facts.*

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TORT: *Duty of care – Breach – Claim – Bullying and assault in special needs school – Allegation that disabled student bullied by fellow students while enrolled in full boarding facility operated by school – Whether school failed to ensure safety of student – Whether there was failure to take necessary action to prevent recurrence – Whether there was failure by Ministry of Education and Government of Malaysia failed to provide proper education in special needs school – Whether claim substantiated and proven – Persons with Disabilities Act 2008*

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The first appellant was registered as an 'orang kelainan upaya' ('OKU') and was an OKU cardholder. He was diagnosed with attention deficit disorder (ADHD) and Asperger's syndrome and suffered from a physical impairment to his left leg. The first appellant enrolled at the first respondent ('school'), and was admitted into its full boarding facilities. The second appellant was the first appellant's adoptive mother and sole guardian. According to the appellants, the first appellant was bullied by a fellow pupil and other students at the school. This was known to the school as the second appellant had raised the issue on numerous occasions with the respondents, with little result. The appellants claimed against the respondents, at the High Court, seeking damages and various declarations, premised on the allegations that: (i) the school was in breach of its duty of care when they failed to ensure the safety of the first appellant, which resulted in four incidents of assault, which was worsened by the failure of the school to take the necessary action to prevent the recurrence of such incidents; and (ii) the respondents failed to provide proper education in a special school in accordance with the requisite standard of national education, pursuant to the Federal Constitution and the Persons with Disabilities Act 2008. In dismissing the claim, the High Court held that the appellants failed to prove (i) their claim of the respondents

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having committed statutory and common law breaches; (ii) the actual occurrences of verbal and physical assaults on the first appellant; and (iii) the failure of the respondents in providing the requisite educational standards relevant to the requirements of the special needs students. Hence, the present appeal.

Held (dismissing appeal)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) There was insufficient evidence, including particularly circumstantial in nature, from which the requisite proper inference could be drawn to justify a conclusion that the appellants had, on a balance of probabilities, established their case that the respondents had breached their duty of care to ensure the safety, security and well-being of the first appellant as a student registered at the school whilst in the school compound and its residential premises, even considering that the school was responsible for providing special education for those in need of special education such as the first appellant who suffered from a learning disability. (para 34)

(2) The appellants failed to prove the allegations of bullying incidents of the first appellant in the first place. The account given by the second appellant, on what the first appellant had to go through in respect of the alleged bullying and assaults *vis-à-vis* the complaints made against the respondents, was plainly hearsay and inadmissible. The notes or journals on the incidents written and recorded by the first appellant himself were also inadmissible since, crucially, the first appellant as the maker did not give evidence. Furthermore, the individual who was alleged to have harassed and assaulted the appellant was neither named as a party nor even subpoenaed to give evidence. (paras 35, 41-43 & 45)

(3) There was insufficient evidence that the respondents failed (i) to ensure a proper and appropriate education and teaching facilities for the first appellant; (ii) to implement a screening system to categorise the students according to their respective disabilities and special needs; and (iii) to ensure the availability of trained, qualified and competent teaching staff and personnel and had not provided special education system and appropriate teaching with a relevant syllabus to special needs students. The appellants had not been able to substantiate their claims to justify the granting of the declarations. (paras 108 & 109)

(4) The question concerning the adequacy of some of the educational standards and policies, including those which were raised by the appellants, *albeit* mostly tangentially, was a matter for the relevant experts in the field of education. Some were policies which were patently unsuited for judicial evaluation. These were for the Legislature and Executive to formulate and enforce. The courts must stay firm in

their respect for the doctrine of separation of powers. Based on the paucity of evidence, in terms of both the lack of expert evidence to support the case of the appellants and the weakness in their evidence on the whole, in no way could it be found that the respondents had failed to provide a structured and appropriate education system for the special needs students that was consistent with their capability and requirements. (para 117)

Case(s) referred to:
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Government Of Malaysia & Ors v. Jumat Mahmud & Anor [1977] CLJU 29; [1977] 1 LNS 29 FC ***(refd)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] CLJU 340; [1998] 1 LNS 340 HC ***(refd)***
Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors [1982] CLJ 150; [1982] CLJ (Rep) 232 FC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 118, 134
Evidence of Child Witness Act 2007, ss. 3, 12
Federal Constitution, art. 12
Penal Code, s. 323
Persons With Disabilities Act 2008, s. 28

For the appellants - Hisyam Yusof & Nur Adeba Ainaa Mohd Noor Rashid; M/s WA Wan Adnan & Assocs
For the respondents - Nur Ezdiani Roleb, Siti Aishah Ramlan, Siti Norashikin Hassanor & Muhammad Amin Azizan; AGC
Watching brief for SUHAKAM - Tay Kit Hoo; M/s Low & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-21NCVC-60-05-2017 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This is an appeal against the decision of the High Court which had dismissed the appellants' claim for declarations and damages against the four respondents on two principal bases. The first was for the breach of their duty of care which the appellants alleged had resulted in the first appellant becoming the victim of physical and verbal attacks whilst under the care and on the premises of the first respondent school, causing injuries and losses to the first appellant.

[2] The second was the alleged failure of the respondents to adhere to the provisions of the Federal Constitution and the Persons with Disabilities Act 2008 to provide the requisite special education of a reasonable standard and quality in fulfilment of the first appellant's needs as a person suffering from learning disabilities in a special needs school.

[3] Having examined the appeal record and considered the submissions by the parties, we unanimously decided to dismiss the appeal for the reasons set out hereunder.

Key Background Facts

[4] The first appellant is registered as an 'orang kelainan upaya' and is an OKU card holder. At age four, he was diagnosed with attention deficit hyperactive disorder (ADHD) and also with Asperger's syndrome (autism spectrum disorder). He also suffers from a physical impairment to his left leg which causes difficulty sitting on the floor. The second appellant is the first appellant's adoptive mother and sole guardian.

[5] The first respondent is Sekolah Menengah Pendidikan Khas Vokasional Seksyen 17 Shah Alam, a special education school which runs both a school and boarding facilities, falling within the purview, control, supervision and administration of the third respondent, which is the Ministry of Education (MOE). The second respondent was at all material times the principal of the first respondent whilst the fourth respondent is the Government of Malaysia.

[6] The first appellant enrolled at the first respondent school on 18 January 2016 and was admitted into its full boarding facilities.

[7] The appellants alleged that the first respondent school was in breach of its duty of care when they had failed to ensure the safety of the first appellant, which resulted in four alleged incidents of assault, which was made worse by the failure of the school to take the necessary action to prevent the recurrence of such incidents.

[8] The one other contention of the appellants is that the respondents had failed to provide proper education in a special school in accordance with the requisite standard of national education pursuant to the Federal Constitution and the Persons with Disabilities Act 2008 ("the PWDA 2008").

[9] On the basis of these two principal allegations, the appellants filed a writ action at the High Court which prayed for the reliefs of declarations and damages against the respondents. These were helpfully summarised by the High Court in its grounds of judgment, which we reproduce hereunder:

> (a) A declaration that right to education as guaranteed under Article 12 of the Federal Constitution means a quality education which is consistent with the disability of the 1st Plaintiff and/or special needs children;

A (b) A declaration that Defendants' failure to provide and implement special needs test or/and system to categories and classify each special-needs child according to their disability and/or education problem constitutes an infringement of Article 12 of the Federal Constitution and Section 28 of the Persons with Disabilities Act 2008;

B (c) A declaration that Defendants' failure to provide trained qualified competent teaching staff and personnel constitutes an infringement of Article 12 of the Federal Constitution and Section 28 of the Persons with Disabilities Act 2008;

C (d) A declaration that failure to provide a structured special education system including the teaching of the relevant syllabus to special needs child constitutes a breach of Article 12 of the Federal Constitution and Section 28 of the of the Persons with Disabilities Act 2008;

(e) General Damages for the 1st Plaintiff;

(f) General Damages for the 2nd Plaintiff;

D (g) Aggravated and Exemplary Damages;

(h) Interest on the General Damages at the rate and for the period deemed fit by the Court;

(i) Costs; and

E (j) Other reliefs.

The Verdict Of The High Court

[10] After a full trial which heard four witnesses called by the appellants and nine by the respondents, the High Court delivered a verdict in favour of the respondents.

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[11] The High Court found that the appellants had on a balance of probabilities, failed to prove their claim of the respondents having committed statutory and common law breaches for their alleged failures to provide a quality education that is consistent with the requirements of special needs student like the first appellant; to provide a safe and secured environment for the first appellant whilst in the first respondent school's compound and under its care; and to prevent the incidents of assault and bullying on the first appellant despite adequate notification by the appellants.

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[12] The High Court thus held that the appellants failed to prove the actual occurrences of verbal and physical assault on the first appellant. The High Court also found that the appellants did not prove their case of the failure of the respondents in providing the requisite educational standards relevant to the requirements of the special-needs students.

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[13] Dissatisfied with the verdict, the appellants filed the instant appeal before us.

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Primary Rival Contention Of Parties

[14] The appellants maintained that they had established the breach of duty of care by the respondents, when the latter failed to ensure the safety of the first appellant, resulting in the said four incidents of assault. According to the appellants, the situation was further exacerbated by the failure of the first respondent-school to take the necessary action to prevent the recurrence of such incidents.

[15] The appellants further repeated their argument which questioned whether the first appellant, being a student with special needs, had been afforded a proper right to education under the Federal Constitution, other statutes such as the PWDA 2008, as well as other international conventions and protocols. They maintained their objections that the first appellant was not given a choice when deciding on school enrolment, that the first respondent had failed not only to assess or screen the first appellant's level prior to his class placement, but also to prepare and enforce an effective individual education plan, as well as to employ teachers and staff qualified in special needs education, and to provide and use structured syllabus or curriculum to adequately provide the necessary support services.

[16] The thrust of the case of the respondents on the other hand is quite simply that the appellants had not proved their claims on a balance of probabilities, as found by the High Court.

Principles Of Appellate Intervention

[17] We must state that the law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:
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> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[18] In a relatively more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

[19] In this light, we will examine the issues raised by the appellants next.

Allegations Of Assault And Bullying

The Law On Duty Of Care

[20] But first, we should state the applicable law.

[21] The law in this tortious claim against the respondents for negligence is fairly settled. In order to succeed, the appellants as the claimants must prove that the respondents owed them a duty of care, that the respondents had breached that duty of care which occasioned loss or damage to the appellants and that the said loss or damage are not too remote.

[22] We acknowledge that the relevant statutes such as the Education Act 1996 do not specifically state the duty of educational establishment such as schools to ensure the safety of their students. However it cannot be disputed that the respondents – primarily the first and second respondents as the school and its principal – owed the appellants – especially the first appellant student – a duty of care. For it has in this country been established as long ago as in the Federal Court decision in *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] CLJU 29; [1977] 1 LNS 29; [1977] 2 MLJ 103 that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil.

[23] Raja Azlan Shah FJ (as HRH then was) made this important observation:

> It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children (see *Ricketts v. Erith Borough Council* [1943] 2 All ER 629 631. It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards v. State of Victoria* [1969] VR 139 141 when he said:

> The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which *ex-hypothesi* (the teacher) should reasonably have foreseen.

[24] It was importantly held by the Federal Court that the duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children, and that it is not a duty of insurance against harm, but only a duty to take reasonable care for the safety of the pupil.

[25] The Federal Court stated that in considering whether or not the school authorities were in breach of their duty of care to the plaintiff, it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably foreseeable; and secondly, assuming it was, whether the appellants took reasonable steps to protect the plaintiff against those risks.

[26] In *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*) the dispute concerned the claim of a lack of supervision on the part of a teacher who had allegedly failed to check or prevent a recalcitrant pupil from wandering about in the classroom, leading to an injury to another fellow pupil, where a pencil tip was accidentally poked into an eye of the latter by the former.

[27] The Federal Court ruled, reversing the High Court, that there was no breach of duty of care to the injured pupil/plaintiff since the risks of injury to the plaintiff were not reasonably foreseeable. It was explained by the Federal Court in the following terms:

> … The trial judge held that Mrs Kenny was negligent in failing to give proper attention to the class all the time, and that if she had paid proper attention to what was going on at the back of the class, she certainly would have noticed that Azmi was missing from his desk and found out what he was doing and thus would have prevented the injury to the plaintiff. The question here is whether there was evidence from which a logical and reasonable inference could be drawn that as a result of the teacher's momentary inattention the injury to the plaintiff was reasonably foreseeable. In other words, according to the trial judge, there was evidence on which he could conclude that the injury to the plaintiff was causally connected with her wrongful act of momentary inattention. With due respect to the trial judge the evidence falls short of the requirement that the injury sustained by the plaintiff was of a kind or type of class reasonably foreseeable as a result of Mrs Kenny's wrongful act, assuming she was wrongful.

A The sole question in the present case is a question of causation. In my judgment it cannot be said that the particular teacher carelessly exposed the plaintiff to injury of the class or type that could reasonably have been foreseen. If the injury which resulted was injury by the sharp end of a pencil, then for the appellants to be liable they must have foreseen injury by the sharp end of a pencil. A pencil is not a dangerous article. All pupils
B use pencil in classrooms. Indeed, the trial judge accepted appellants' contention that to say that there was a duty by them to instruct each and every pupil on the proper use of a pencil was to stretch things to a ridiculous extent. Again, assuming the injury to the plaintiff's eye was in fact caused by a wrongful act of the teacher – for not being attentive in class all the time – it cannot be said that it was reasonably foreseeable that
C the injury of this class or character was a reasonably foreseeable result of such a wrongful act.

[28] In light of this important authority, we state that it is indisputable that under the law, a school such as the first respondent owes a duty of care in the sense of ensuring the provision of a safe and secure learning and living
D environment for its students such as the first appellant; and this is especially so for the first respondent which additionally provides boarding facilities which also gives rise to a duty of care to ensure that the safety and wellbeing of the students who reside in the on-campus student hostel in all of their school activities.

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[29] Significantly however, as stated in the case of *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*), the law does not attach strict liability on a school teacher (and thus the school and the relevant education authorities) for the torts of his/her pupil, but only on proof that the teacher had failed to exercise reasonable care in controlling the pupil which could
F have avoided the injury to the plaintiff. It is thus a matter of evidence and inference, where great care needs to be taken to see that the breach of the duty of care must be causally related to the injury received.

[30] As such, the court must first find that the bullying did take place, and
G that injuries, if any, sustained by the first appellant being the victim of bullying whilst in the care of the appellant was caused directly and substantially or materially contributed by the said failure and omissions on the part of the first and second respondents to take action or ensure proper supervision.

H **[31]** We do not disagree that if proven, the failure or lack of action on the part of the respondents in protecting the first appellant from a continuous events leading to the incidents of bullying and assaults allegedly endured by him would have constituted a clear breach of the duty of care imposed on the respondents, particularly and more directly the first and second
I respondents, being the school and its principal, respectively. Repeated and continuous incidents, if initial ones were known or reported to the school authorities, it would suggest that they would have been reasonably foreseen.

[32] We reiterate that it must have been reasonably foreseeable by the respondents that their failure to ensure adequate supervision could result in the injuries sustained by the first appellant from the alleged assaults. To put it another way, such risk of injuries must have been reasonably foreseeable by any such failure by the respondents to ensure proper supervision of the students at the first respondent school.

[33] In this instant case before us, the position taken by the appellants is that bullying of the first appellant by a fellow pupil, whom we shall refer to as "H" and other students had been building up and in fact escalated into physical attacks. It was known to the school that assaults had occurred which they ought to have given proper attention to, especially since the second appellant had herself raised the issue on numerous occasions with the respondents, with little results. The injury suffered by the first appellant was thus reasonably foreseeable as a result of the failure by the school to take appropriate actions such as to prevent recurrence.

Analysis And Findings – Allegations Of Assault And Bullying

Burden Of Proof On The Appellants

[34] Having examined the appeal record and considered the submissions by parties, we find there is insufficient evidence – including particularly circumstantial in nature – from which the requisite proper inference could be drawn to justify a conclusion that the appellants had on a balance of probabilities established their case that the respondents had breached their duty of care to ensure the safety, security and wellbeing of the first appellant as a student registered at the first respondent school whilst in the school compound and its residential premises, even considering that the school is responsible for providing special education for those in need for special education, such as the first appellant who suffers from a learning disability.

[35] This is because the appellants failed to prove the allegation of bullying incidents on the first appellant on the balance of probabilities in the first place. They could not prove the actual occurrences of verbal and physical assault on the first appellant as alleged and pleaded.

[36] We remind ourselves of the well-entrenched rule that the appellants as the plaintiffs or claimants in this case bear the burden of proving their case. This rule is embodied in s. 101 of the Evidence Act 1950 which states that:

> (1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[37] In addition, the appellants also bear the burden of introducing evidence – or the evidential burden – as governed by s. 102 of the Evidence Act 1950 which states that:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[38] The burden of proving or establishing a case rests throughout the trial or hearing on the party who asserts the affirmative. However, the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side or the other (see also the High Court decision in *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523).

[39] In this regard, we should additionally refer to the leading decision of this Court in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which reaffirms the rule that "he who asserts must prove", whereby Siti Norma Yaakob JCA (as she then was) instructively held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[40] Therefore the appellants must, to begin with, prove the occurrence of the alleged incidents of bullying and assaults as they pleaded against H and other students, and the failure of the respondents to prevent them.

The First Appellant Did Not Give Evidence

[41] However, as correctly emphasised by the respondents, and found by the High Court, the account given by the second appellant at trial on what the first appellant had to go through in respect of the alleged bullying and assaults *vis-à-vis* the complaints made against the respondents is plainly hearsay and therefore inadmissible.

[42] So too are the notes or journals on the incidents written and recorded by the first appellant himself inadmissible, since crucially the first appellant as the maker himself did not give evidence. In fact, when it was suggested

to the second appellant in her cross-examination that "Puan tak pasti sejauh mana kebenaran kandungan insiden yang dicatatkan oleh Adam di sini?", the second appellant replied in the affirmative.

[43] And it cannot be emphasised enough that importantly, even the first appellant himself who claimed to be a bully victim in the alleged incidents did not testify in his own case.

[44] Thus we reiterate that the evidence in the contents of the journal purportedly entered by the first appellant as its maker who did not testify, detailing the alleged incidents are all hearsay and was correctly rejected, as was also the testimony on the same by his mother – the second appellant, who related to the court what was told to her by the first appellant about the alleged incidents.

[45] On top of all that, we also find that the case of the appellants on the alleged incidents could not succeed as the individual who was alleged to have harassed and assaulted the first appellant – H – was neither named as a party nor even subpoenaed to give evidence in court. Thus, other than the non-calling of the first appellant as a witness, neither was H. The two key characters in these incidents were not even called to testify.

[46] The appellants argued that the inability of the first appellant to take the stand must not be weighed against their case, and neither should any adverse inference be drawn in this regard. They referred to s. 118 of the Evidence Act 1950 which provides as follows;

> 118. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

[47] We do not find this submission of the appellant tenable. We must highlight that s. 118 as set out by the appellants themselves clearly provide that all persons are competent to testify unless the court considers otherwise, for any cause as specified. But here, the first appellant never even in the first place made himself available in the stand to enable the court to make that requisite assessment of his level of competency.

[48] Furthermore, the appellants also submitted that the evidence of one Dr Subash Kumar Pillai, a consultant psychiatrist (SP4), especially in his answer to the questions from the court, had stated, amongst others, that from his experience, such a child like the first appellant will usually not lie about having been harmed. In our view this testimony for what it says plainly does not assist the appellants. Why then did the appellants do not call the first appellant to testify. SP4 even stated in effect that a person with Asperger's syndrome could competently give an account of his experience.

[49] Now, it should be understood that under the Evidence of Child Witness Act 2007, even a child witness, who is one below the age of 16 may, at any stage of a trial, under s. 3 of the Act give evidence by having a screen between him and the accused in a criminal trial, by live link or by video recording, or by any combination of the three. Any evidence so given is deemed to be evidence given in an open court. In fact, more pertinently, under s. 12 of the same Act, a child witness who is suffering from any disability which is defined to include activity limitation resulting from physical, intellectual or sensory impairment may, apart from giving his evidence in any manner prescribed in s. 3, give his evidence in any other manner in which he can make it intelligible. However, even this statutory provision was not utilised by the appellants. Nevertheless, the first appellant was already 17 when he enrolled into the first respondent school in 2016.

[50] At the same time, we must emphasise the trite principle that evidence is to be weighed and not counted. This is well-settled under s. 134 of the Evidence Act 1950 where no particular number of witnesses is required to prove any fact. The testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] CLJU 340; [1998] 1 LNS 340; [1998] 3 MLJ 457). The overarching principle, it must be reiterated, is that evidence has to be weighed and not counted (see *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523; [1996] 5 MLJ 473).

The Four Specific Alleged Incidents And Other Issues

[51] Despite such deficiencies, we should next consider the alleged incidents. As for the alleged incident on 17 May 2016 (the first incident), it was claimed by the appellants that between 10 and 10.30pm, a fellow pupil – H, who has a hearing impairment and stayed in a dormitory on a different floor, assaulted the first appellant. It was also contended that one of the first appellant's legs was tied to the bed he was laying in.

[52] SD4 – Nurul Izani Ainun binti Ahmad Zaini (Penolong Ketua Warden), the warden on duty that night heard the first appellant's scream and when she arrived at the dorm and asked the first appellant what had happened, the first appellant said H disturbed him. However, H, from a different floor, but who was also there claimed that the first appellant disturbed him earlier. SD4 said that she saw the first appellant standing and not tied to the bed.

[53] The testimony of the school principal – the second respondent, SD2 – Encik Sazali bin Mohd Karli explained that he was informed a few days after the incident by SD4, who was the 'penolong ketua warden', of an incident he described as "perselisihan faham antara Adam (the first appellant) dan seorang murid lain", and maintained there was no fighting, but only "perselisihan faham".

[54] However, despite the second appellant not having direct personal knowledge of the incident, and notwithstanding the fact that the two – the first appellant and H were not called to give their respective versions of the incident, we observe that as mentioned, the respondents as the defendants did call SD4, the warden on duty that day, who went to check on what had happened, who confirmed that the first appellant had not been tied, did not suffer any injuries, and who also confronted H who claimed that the first appellant had disturbed him earlier, and SD4 had then advised the first appellant and H to resolve their dispute. SD4 had informed the incident to the principal (SD2), who in turn confirmed when testifying that SD4 had updated to him about the same. On the other hand, in court, the second appellant merely denied and disagreed with the respondents' suggestion that the first appellant was found by the warden (SD4) without his feet bound. There was no direct witness of the first incident.

[55] The second incident happened on 21 June 2016. This concerned the claim by the appellants that the first appellant was again assaulted, not just by H, but also by three others whilst the first appellant was performing his prayers in the surau. Immediately after, he asked the second appellant to take him home a day earlier than usual. She claimed to have discovered bruises and signs of punching, on the lower part of his back.

[56] We note that photographs of bruises were taken and tendered in court. The first appellant was medically examined at PPUM on 24 June 2016. The maker of the relevant medical report, Dr Yamuna Sivapathy, a medical officer (SP2), did confirm that the first appellant had complained of pain when examined by her, and that the injuries, according to her, were consistent with being assaulted. Nevertheless, it must be highlighted that SP2 agreed in court that in that report dated 18 January 2017 (P16) (with respect to the said examination of 24 June 2016), it was recorded that "no bruises were visible" and that the first appellant had sustained "soft tissue injury secondary to physical assault".

[57] The second appellant alerted the first respondent school about the incident on 23 June 2016, wrote a complaint to the MOE (which led to the issuance of D21, to be referred to below), lodged a police report of the incident, and she even disclosed the matter to the press, as carried by The STAR on 26 June 2016.

[58] The respondents in their statement of defence denied that the second incident took place. However, in court, SD2 (the school principal, also the second respondent) testified that he was informed of the incident at about 11.45pm on 23 June 2016 by the 'guru bimbingan dan kaunseling', and explained that the school took no action to probe the incident, as the matter was being investigated by the police.

[59] This, we surmise, may not be an entirely satisfactory reaction by the school authorities, but crucially, SD7 – Inspector Nurul Al-Shakinaqaiyum Alladin, who investigated the second incident, testified that the police did not even specifically investigate bullying but the offence of voluntarily causing hurt under s. 323 of the Penal Code instead. SD7 in her witness statement stated that she found insufficient evidence to sustain a change under s. 323 of the Penal Code and that the Deputy Public Prosecutor had ordered no further action (NFA) on the matter. SD7 also stated that the incident was caused by the conduct of both individuals – the victim (the first appellant) and the suspect (H).

[60] We add for emphasis that in respect of this second incident, there were also no direct witnesses of the alleged assault on the first appellant who himself did not make any report to the first and second respondents until the discovery by the second appellant on 23 June 2016 – which was two days after the alleged assault. The respondents on their part never received any complaint about the first appellant having been spat on, punched or kicked whilst performing his prayers at the surau on the date, as confirmed by SD2. Dr Jamila binti KA Mohamed Kutty – Guru Penolong Kanan HEM (SD6) too testified that there were no reports of any incident on that day.

[61] Furthermore, it cannot be denied that this second incident was not even mentioned in the witness statement of the second appellant. It was also not mentioned in her oral evidence given in court. In fact, this incident was not even recorded by the first appellant in his notebook or journal. Not to mention that, again, neither the first appellant nor H nor any other students were called to testify.

[62] Clearly therefore, the absence of witnesses of the second incident to support the appellants' case, coupled with the evidence of the outcome of police investigation which did not find bullying, and with the second appellant herself is not testifying on the second incident, we find that the conclusion of the High Court on lack of evidence cannot be faulted.

[63] Despite such shortcomings, we still do take cognisant of the fact that the first respondent school had prepared and submitted a report of certain incidents (including the first incident and the second incident) to the third respondent – the Ministry of Education (MOE), which however the appellants complained was never produced in court, for them to challenge.

[64] We observe nevertheless that the respondents did tender exh. D21 which was a letter dated 3 August 2016 from the Public Complaints Bureau (PCB) to the second appellant enclosing the reply from the MOE to the second appellant in its letter of 1 August 2016 (signed off by Encik Sazali Ahmad, Pengarah Bahagian Pendidikan Khas MOE) in respect of the complaints made by her in an email dated 28 July 2016. The Public

Complaints Bureau in its said letter of 3 August 2016 stated that PCB viewed that the MOE letter of 1 August 2016 had provided the necessary clarification to the second appellant in response to the complaints raised by the second appellant to the PCB (which was subsequently extended by PCB to the MOE).

[65] In the said letter from MOE, it was stated that based on investigations by the MOE, on a complaint by the appellants against the warden SD4, it was stated that SD4 did not intend to cause any conflict between parents. She had merely *via* SMS informed the parents of another pupil that the behaviour of their son changed drastically after he followed the first appellant and slept over at the residence of the appellants. SD2 as the principal of the first respondent school had in a meeting involving these individuals merely sought to manage the situation and did not seek to take side in favour of SD4.

[66] Furthermore, the said MOE letter stated that as the second appellant did not consider the first respondent school adhere to or maintain the standards she expected, the school principal (SD2) had merely suggested that the second appellant consider enrolling her son to an institution that could offer better and higher quality education. SD2 denied asking the second appellant to take her son out of the first respondent school.

[67] Significantly, as for the alleged bullying and other incidents of physical assaults, including the first incident and the second incident, the MOE found that the wardens had discharged their duties in accordance with the relevant standard operating procedures, and that the incidents and the pupils responsible would be reported to the school management for the attention of the principal.

[68] Of some interest is the fact that the MOE letter also listed four disciplinary incidents involving the first appellant.

[69] The first, in February 2016 concerned the first appellant scolding a 'pembantu pengurusan murid' (PPM) for waking him up for being late. The second occurred on 29 March 2016 where a pupil called the first appellant "bodoh" after the latter screamed at a 'pembantu pengurusan murid' (PPM) when the first appellant discovered he lost his locker key. On the same day, a surau students committee member had also scolded the first appellant for being late in taking his bath, prayers and dinner. The third was the 17 May 2016 incident – which was the aforementioned first incident, where the first appellant had an altercation with H; and the fourth, on 21 June 2016 was the second incident, where MOE stated that there was no witness as to what had happened in the surau, which as mentioned earlier, the appellants alleged involved another altercation between the first appellant and H, and a few other pupils.

[70] This MOE letter shows that matters involving the first appellant are not confined merely to the alleged bullying incidents victimising him, but also the first appellant's own disciplinary issues as well as the problematic relationship between the second appellant and the principal, teachers and staff of the first respondent school. The same letter set out actions taken by the respondents on these issues. The alleged bullying incidents were not the only focus of the appellants' complaints.

[71] Next is the third incident on 26 August 2016. The appellants alleged that about two months after the second incident, yet another incident occurred – on 26 August 2016. Then, while performing his prayers at the school's surau, the first appellant's chair was pulled from behind him when he was standing, causing him to fall on his back and hitting his head hard. This resulted in swelling to his head, and him becoming dizzy.

[72] This incident – specifically that the first appellant fell down and experienced dizziness and that he had been taken to the clinic, was informed to his second appellant mother, who was already on her way to pick him up. Later, fearing for her son's safety, she wrote to the first respondent school that the first appellant should no longer pray at the surau. The second appellant also complained to the third respondent on 29 August 2016 detailing the third incident and issued another complaint *via* email dated 2 September 2016 setting out the various incidents of assault against the first appellant.

[73] It is in evidence, however, that SD3 – Mohd Hairi bin Yaakub, who was the class teacher, informed the court that on the morning of the incident, the first appellant told him that his head was painful. SD3 did notice a swelling on the first appellant's head and took the first appellant to the school's Penolong Kanan Hal Ehwal Murid, Dr Jamila (SD6), who asked SD3 to arrange for the first appellant to be taken to a clinic, which was duly attended to by a 'pembantu pengurusan murid' (PPM). Later, after the clinic visit, the first appellant said he was able to continue classes.

[74] The appellants submitted that the first appellant's class teacher, SD3 later in the same day notified the second appellant but testified when asked that he never enquired from the first appellant what had happened and how he got injured. SD3 stated that the warden on duty that day was either Cikgu Shahril or Cikgu Hasni but neither of whom were called as witness.

[75] SD6 (Dr Jamila, the Guru Penolong Kanan Hal Ehwal Murid), confirmed to the court that on 26 August 2016 she had requested SD3 to have the first appellant taken to a clinic, and that the first appellant did tell her that "I think someone pushed my chair". SD6 then directed the discipline teacher (Cikgu Azman), to make inquiries but was informed that no one witnessed the incident. Moreover, there were no CCTV cameras at the surau area, and the identity of the individual responsible for the mischief is unknown.

[76] The appellants highlighted that SD6 informed the court that investigations had been conducted by the school but agreed that none of the records of the said investigations were produced in court. SD6 also confirmed that all the relevant teachers, warden and 'pembantu pengurusan murid' (PPM) who were in charge that morning were also not called as witnesses.

[77] We note nevertheless that from the evidence of SD3 and SD6 that it was not known who was responsible for the fall. The first appellant himself we reiterate did not give evidence in the trial. On the other hand, no evidence was proffered by the appellants to show who was responsible, if at all, for the first appellant suffering a swelling on his head. There is no direct evidence in support of the incident of assault by any specific person at the school. The appellants tried to suggest that the evidence proffered by the defence was insufficient. But what is truer and more glaring is that the evidence of the appellants as the claimants are considerably deficient to begin with.

[78] Significantly too, we observe that the second appellant in fact agreed when cross-examined that the first respondent school had taken the reasonable step of ensuring immediate medical attention for the first appellant by taking him to the clinic. The appellants' allegation that the first and second respondents were careless, lackadaisical in breach of duty of care in this regard could not thus be sustained.

[79] The fourth incident happened on 16 November 2016. The final incident complained about by the appellants occurred on 16 November 2016, where it was alleged that the first appellant was attacked by a fellow student – again H – while the first appellant was speaking to the second appellant on the phone. It was submitted that the said conversation which transpired when the assault was on-going was recorded by the second appellant.

[80] This audio recording was even played in the trial at the High Court. The appellants contended that the audio recording established that the first appellant was being attacked and had desperately tried to get help from the school staff but none came. Two police reports were even lodged in respect of this incident.

[81] SD2, the second respondent testified that he was informed by the 'Ketua Warden', one Cikgu Shahril that the school had only became aware of the incident after the police came to the school. This was because no complaint was lodged by the appellants. SD2 further confirmed there was a security guard, a warden and a 'pembantu pengurusan murid' (PPM) on duty at the material time of the incident, but none was called to dispute the version of the appellants.

[82] SD5 – Noor Faradzillah binti Abd Rahim – the school counsellor, in her evidence confirmed that she was unaware of the incident at all as she had not been so informed. SD6 (Dr Jamila – Penolong Kanan HEM) admitted in cross-examination to having knowledge of the same but confirmed that the school did not carry out any investigation on the matter. Further, the 'pembantu pengurusan murid' (PPM) on duty – Cikgu Alia and Cikgu Ana – were also not called to give evidence.

[83] Nonetheless it cannot be denied that the transcript of the phone conversation disclosed no mention of the first appellant being assaulted or having been assaulted. It was merely that the first appellant stating that H "wants to take the slipper", impliedly saying that H could use the slipper to beat up the first appellant. There is in other words, no evidence that the first appellant was in fact punched or assaulted in that incident.

[84] In fact, under cross-examination, the second appellant confirmed that the voice recording did not indicate that the first appellant was already assaulted and confirmed that H had merely gestured to beat up the first appellant.

[85] Significantly, there is no evidence as to the outcome of any police investigation following the making of the reports. What is clear is that the first appellant was not physically assaulted and the second appellant too was unable to ascertain what had actually transpired in the purported event that was the fourth incident.

[86] The High Court could not therefore be faulted for finding that certain of the evidence of the second appellant to be unreliable and actuated by self-serving purposes.

[87] At the risk of repetition, we have mentioned other documents which had been admitted in evidence, such as the medical report issued by the University Malaya Medical Centre dated 18 January 2017 which stated no swelling or bruises were visible, and whilst there were also pictures of the said injuries, we find them unclear.

[88] Further, as mentioned, there were complaints sent by the second appellant to the MOE not just on the four alleged incidents but more about other issues concerning the first respondent school. Specifically, she emailed the MOE on 13 April 2016 complaining about certain alleged shortcomings in the discharge of the school's responsibilities, its treatment of complaints and of its students but also claiming that the chief warden and certain staff felt that the second appellant was merely causing trouble and finding fault with the school, even to the extent that she was told to send the first appellant to a different school. There was no specific reference to any bullying incident in this email.

[89] The email dated 14 April 2016 expressed the second appellant's dissatisfaction at what she described as the absence of cooperation between the school administration and the parents, claiming that the warden singled out the first appellant as being lacking in discipline and even viewed that he be transferred out of dormitory without his mother being consulted on any of the alleged issues.

[90] This was followed with another email on 17 April 2016 when she complained about the lack of sleeping time and the stress it could cause to the pupils. In a subsequent email on 19 April 2016, the second appellant complained about the high blood pressure reading of her son whom she had brought to see a doctor, claiming it was due to stress, lack of sleep and food. In this email, she identified two pupils whom she claimed perpetrated mental and emotional bullying on the first appellant, and she also urged the respondents to perform counselling on these two as her son feared they would physically assault him if he reported them to the school authorities.

[91] There was another email on 21 April 2016 stating that the dormitory staff were always pressuring her son without any interest to understand his issues, whilst the email on 27 July 2016 focused on the second appellant's complaint against a lady warden whom she said had unfairly and unprofessionally treated her and her son. In this email, the second appellant mentioned the said first incident (17 May 2016) where the first appellant was in his dorm, punched by student H from a different dormitory but the two students were described by the lady warden in a subsequent report as being playful.

[92] Then there was, as referred to above, an email dated 28 July 2016 issued by the Public Complaints Bureau of the Prime Minister Office addressed to the Special Education Department of the MOE requesting for a status update on the complaint raised by the second appellant specifically concerning her dissatisfaction about how the principal dealt with her query on the involvement of one of the teachers whom the second appellant alleged to have bad mouthed her to another parent and related thereto, the second appellant claimed that the principal and the school thereafter refused to hear her complains about bullying but instead said that her son – the first appellant was the one who was causing problems. The MOE had addressed these, as stated above.

[93] In an email on 1 August 2016, the second appellant informed the respondents that she would not attend a meeting scheduled for the following day with the chair of the first respondent school's PIBG as many of her earlier complaints were either ignored or still remained unresolved.

[94] Thus, these emails covered a variety of issues raised by the appellants, which are not confined to allegations of bullying only. They clearly demonstrate the second appellant's deep-seated dissatisfaction especially with the first and second respondents.

[95] On top of all that, the second appellant had also lodged five police reports. These were first, dated 24 June 2016 which concerned the second incident which happened on 21 June 2021 referred to above; secondly, 24 July 2016 on a suspected theft of the first appellant's mattress cover and sports attire at his hostel; thirdly, 29 July 2016 about a fellow student taking the first appellant's mattress cover which was then retrieved by the first appellant from that other student, which matter was not reported to the hostel warden; fourthly, 4 September 2016 about a call received by the second appellant from a man claiming to be the chairman of the first respondent's PIBG allegedly warning her not to cause problems to the school; and, as also referred to above, fifthly dated 16 November 2016 – or the fourth incident – about a call the second appellant received from her son at the first respondent school allegedly telling her that a fellow student was about to assault her son before the phone went dead. But none resulted in any prosecution against any person.

[96] The appellants' claim against the respondents is primarily grounded on the respondents' undisputed duty to keep the first appellant safe at all times whilst under the care of the first respondent.

[97] However, given our analysis above, we conclude that the appellants' claim that the respondents were negligent in failing to be alerted to the allegedly ongoing incidents of bullying which resulted in the consequent escalation and bullying of the first appellant, to have been correctly found by the High Court not to have been established.

[98] In other words, the appellants had not proved the respondents' failure had caused the assault and alleged bullying incidents on the first appellant. The appellants could also, as mentioned earlier, not prove their version on the actual occurrences of verbal and physical assault on the first appellant in the first place. Negligence was as such, not established against the respondents whom we agreed had taken all necessary and reasonable measures to provide a safe and secured environment for its special-needs students whilst on the first respondent school's ground.

[99] We note that the principal (SD2) did also testify that contrary to the contention of the appellants, the respondents had ensured the presence of a reasonably safe, secure and appropriate educational facilities at the first respondent school. For instance, every classroom is assigned with two teachers for every eight pupils, whilst at the residential hostel, the presence of wardens and 'pembantu pengurusan murid' (PPM) could not be denied, despite the allegation in respect of the four incidents of bullying as contended by the appellants.

[100] We agree that there was insufficient evidence of the respondents' failure to ensure a safe and secure environment to the pupils of the school. In other words, there was no breach of the requisite of duty of care on the part of any of the respondents. And no question of vicarious liability, particularly on the part of the third and fourth respondents would therefore arise.

[101] We stress that even if the version of the appellants on the first incident, second incident, third incident or fourth incident is correct – which it is not – it could certainly not be said, in light of the facts and evidence in this case, that the risks of these said incidents were reasonably foreseeable by the respondents. Even if assuming that the risks were foreseeable – which they were not – the respondents did not fail to take reasonable steps to protect the first appellant against those risks.

[102] In conclusion, we find that based on the Federal Court decision in *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* (*supra*), the appellants had on a balance of probabilities not succeeded in showing the respondents had breached of their duty of care which caused the first appellant being a victim of physical and verbal attacks while on school grounds suffering injury and loss.

Analysis And Findings – Complaints On Non-compliance With Educational Regulations And Standards

[103] We also find that the High Court was correct in dismissing the reliefs sought by the appellants for various declarations to the effect that the respondents had failed to provide proper education in a special school within the standard of the National Education Program. As mentioned above, specifically, the appellants asked for a declaration that first, the right to education guaranteed in art. 12 of the Federal Constitution in this case means a quality education relevant to the disabilities specific to the first appellant.

[104] Secondly, a declaration that the relevant respondents failed to implement a screening test or system to categorise every student with special needs which are specific and tailored to their respective disabilities and problems in breach of art. 12 of the Federal Constitution and s. 28 of the PWDA 2008. Thirdly, a declaration that the respondents failed to make available teaching and other staff who are certified, trained and experienced in the field of special education in breach of art. 12 and s. 28 of the PWDA 2008. Fourthly, the appellants prayed for a declaration that the respondents' failure to provide a structured special education system with a suitably selected teaching syllabus for special-needs student is yet another breach of the said constitutional and statutory provisions.

[105] Now, art. 12 of the Federal Constitution essentially prohibits discrimination against any citizen in respect of the admission of pupils or students in any public educational institution. Patently, the appellants could not show the respondents had infringed this constitutional provision. They did not even suggest how the respondents had discriminated against the first appellant in his admission to the first respondent school.

[106] Section 28 of the PWDA 2018 provides that children with disabilities shall be treated on equal basis and shall not be excluded from pursuing further education including vocational training and lifelong learning. The entirety of s. 28 reads as follows.

> Access to education
>
> 28(1) Persons with disabilities shall not be excluded from the general education system on the basis of disabilities, and children with disabilities shall not be excluded from pre-school, primary, secondary and higher education, on equal basis with persons or children without disabilities, including vocational training and lifelong learning.
>
> (2) The Government and private educational providers shall, in order to enable persons and children with disabilities to pursue education, provide reasonable accommodation suitable with the requirements of persons and children with disabilities in terms of, among others, infrastructure, equipment and teaching materials, teaching methods, curricula and other forms of support that meet the diverse needs of persons or children with disabilities.
>
> (3) The Government and private educational providers shall take appropriate steps and measures to enable persons and children with disabilities to learn life and social development skills in order to facilitate their full and equal participation in education including the following:
>
> (a) to facilitate the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
>
> (b) to facilitate the learning of Malaysia Sign Language and the promotion of the linguistics identity of the deaf community; and
>
> (c) to ensure that the education of persons, and in particular children, who are blind, deaf or deaf-blind is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

[107] In our view, the declarations prayed for by the appellants which primarily sought the recognition that the respondents must educate and provide teaching and learning facilities, as well as related infrastructure appropriate to the requirements of the special-needs students may justifiably

be based on the said s. 28 of the PWDA 2008. To this extent, we disagree with the finding of the High Court that there are no legal provisions in support of the second appellant's contention on the respondents' duty to provide to the first appellant the required special education, facilities and services consistent with the requirement for him as a special-needs student. Nevertheless, we must state that the appellants have also not proven their case that there had been any infringement of the provisions of s. 28 of the PWDA 2008 in the first place.

[108] We find that there is insufficient evidence that the respondents had failed to ensure a proper and appropriate education and teaching facilities for the first appellant, or that the respondents had even failed to implement a screening system to categorise the students according to their respective disabilities and special needs, to start with. Neither could we conclude that the respondents had failed to ensure the availability of trained, qualified and competent teaching staff and personnel nor that the respondents had not provided a structured special education system and appropriate teaching relevant syllabus to special-needs students.

[109] We say so because in our assessment, the appellants had simply not been able to substantiate their claims to justify the granting of the declarations. For one, the evidence of their witness, Sitra Panirsheelum, a behavioural therapist (SP3) was correctly found by the High Court not to be one given by a specialist as SP3 did not have the requisite training, competency or the necessary qualification when giving evidence, especially since she had not at that time obtained both her masters' degree and specialist qualifications. On top of that, SP3, never conducted any examination on the first appellant.

[110] Specific complaints were similarly not proven. One is that the first appellant's alleged sleeping disorder was caused by the first respondent's hectic study schedule. But the appellants' own witness, Dr Subash Kumar Pillai, the consultant psychiatrist (SP4) was unable to confirm whether the first appellant's sleeping disorder was due to his own personal sleeping disorder, some medical condition or the first respondent's heavy schedule. In contrast, in her testimony before the court, Siti Aisyah Ismail – Penolong Pengarah Unit Pengurusan & Pembangunan Perkhidmatan Sokongan Perkhidmatan Khas, MOE & Pegawai Psikologi Klinikal (SD9), confirmed that the individual education plan (IEP) prepared by SD3, who was the class teacher of the first appellant, was aligned with the curriculum implemented during the teaching and learning sessions at the first respondent's school. This therefore also goes some way towards refuting the second appellant's allegation that the first appellant's sleeping disorder was caused by a hectic schedule of the first respondent school.

[111] On the second appellant's claim that she had wanted the first appellant to attend a science program in a mainstream school but was forced to opt for the first respondent school, this is on evidence shown to be without substantiation, especially since in her own testimony, the second appellant instead stated that the choice of a new school was due to its proximity to her workplace and residence. Furthermore, the first appellant's placement in desktop publishing course was jointly made with his mother on the day of his registration into the first respondent school. Evidence from the respondents' witnesses, namely one Encik Hanizan – Ketua Unit Perhubungan & Khidmat Pelanggan, Bahagian Pendidikan Khas, MOE (SD1), the principal (SD2) and Dr Jamila – Guru Penolong Kanan HEM (SD6) confirmed that the first appellant's transfer to the first respondent school was made at the second appellant's own request.

[112] The case of the appellants is not made any stronger by some of the vague and dismissive answers given by the second appellant when cross-examined on her key allegations about the respondents' failures in providing suitable and appropriate individual education plan ("IEP") programs, and the requirements for qualified teachers and staffs for special needs education, structured curriculum, therapies and other support services. So were her answers dismissive on the issue of the ratio of two teachers to eight students in the first appellant's classroom, and in respect of the respondents' requirement of an assessment test, made prior to the student's admission to special needs vocational school which necessitated medical screening and medical reports.

[113] Instead SD2, SD3 and SD6 confirmed that all special-needs students including the first appellant, had undergone continuous assessment for their respective courses for a period of three months.

[114] Despite her evidence that her son would have performed better if the pre-admission assessment had been made based on the first appellant's interest, SD1, SD2 and SD6 testified that the first appellant did not in fact undergo the school's assessment test which was held during the orientation week as he had registered with the first respondent school only a week after the orientation. On the date of his admission on 18 January 2016, the first appellant had taken medical leave for a period of nine days until 26 January 2016.

[115] Moreover, both SD6 (Dr Jamila) and SD8 (Puan Salmah Jopri – Timbalan Pengarah Bahagian Pendidikan Khas, MOE) had also confirmed in court that it was not the duty of the first respondent school to provide a special assessment test to ascertain the specific educational problem of its students and that their duty was merely to determine the required course and appropriate academic syllabus for their students. The witnesses also confirmed that, both the third and fourth respondents (being the MOE and

the Government) have successfully created a special education system which included the IEP – individual education plan program for all special-needs students. This is not to mention the finding of the High Court that the appellants' education experience in USA where both had lived to be less than comparable to the respondents' duty to provide a structured and appropriate education system to the special-needs students.

[116] It bears emphasis that the first respondent is a selected school within the state that provides special education program to all special-needs students to give them the opportunity to obtain the Malaysian Skilled Certificate (Sijil Kemahiran Malaysia) to facilitate their future employment.

[117] We must stress that the question concerning the adequacy of some of the educational standards and policies, including those which are raised by the appellants (*albeit* mostly tangentially), is a matter for the relevant experts in the field of education. Some are policies which are patently unsuited for judicial evaluation. These are for the Legislature and the Executive to formulate and enforce, and the courts must stay firm in their respect for the doctrine of separation of powers. Thus, based on the paucity of evidence, in terms of both the lack of expert evidence to support the case of the appellants, and the weakness in their evidence on the whole, in no way could this court find that the respondents had failed to provide structured and appropriate education system for the special-needs students that is consistent with their capability and requirements.

Conclusion

[118] In *Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors* [1982] CLJ 150; [1982] CLJ (Rep) 232; [1981] 2 MLJ 27 the Federal Court held as follows:

> It is settled law that a school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of supervision depends on the circumstances of each case, such as the age of the pupils and what they are doing at the material time. If the teacher knows that the pupils are engaged in doing acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of the acts.

[119] We cannot emphasise enough that school authorities, including teachers and staff, undoubtedly owe a duty of care to ensure the safety of their pupils and students within the compound and premises of the school. They are responsible for the student's safety, welfare and well-being. Bullying has no place in any civil society and is plainly an anathema to a modern education system. In this case, we are not unsympathetic to the problems and plight encountered by the appellants. Disagreements and even altercations there could have been, especially involving the first appellant and H – but

courts make decisions based on facts and evidence. And here, the evidence is less than sufficient, let alone convincing, on a balance of probabilities that these were bullying activities and the first appellant was the victim.

[120] It goes without saying that schools must also in their operations ensure adherence to the regulations, standards and policies issued by the educational authorities, including in respect of the provision of special education to special-needs students. But again, infringements of these have not in the instant case been established.

[121] In conclusion, in light of the foregoing analysis and reasons, we find that the appellants had failed to prove their claim against the respondents on a balance of probabilities such that the High Court could not be said to have been plainly wrong in arriving at its conclusion which we hereby unanimously affirm.

[122] Accordingly, this appeal is dismissed. We make no order in respect of costs.